U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 March 2006

BALCA Case No.: 2005-INA-00010
ETA Case No.: P2004-NY-02502816

In the Matter of:

MONSEY TRAIL-TOURS, INC.,
Employer,

on behalf of

NEVILLE RAWANA,
Alien.

Appearance: Maritza Diaz, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A)

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

(hereinafter "the Act"), and Title 20, Part 656 of the Code of Federal Regulations.[2] We base our decision on the record upon which the Certifying Officer (hereinafter "CO") denied certification and the Employer's request for review, as contained in the appeal file (hereinafter "AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, Monsey Trail-Tours, Inc. (hereinafter "the Employer") filed an application for labor certification to enable Neville Rawana (hereinafter "the Alien") to fill the position of Auto Mechanic in Spring Valley, New York. (AF 94). The Employer required all applicants for the job to have his/her own tools and two years of experience. (AF 99). The Employer filed a request for Reduction in Recruitment (hereinafter "RIR") processing with its application for certification.

On February 26, 2004, the CO issued a Notice of Findings (hereinafter "NOF") proposing to deny certification. (AF 85-86). Citing to Section 656.20(c)(2), the CO noted that the Employer's wage offer did not equal or exceed the prevailing wage. Specifically, the Employer's wage of $650 per week is below the prevailing wage of $866.40. In accordance with 20 C.F.R. § 656.40 (a) (1), the occupation of automobile mechanic is one for which a prevailing wage determination has been made under the McNamara-O'Hara Service Contract Act and it is not subject to the 5 percent variance defined at Section 656.40 (2)(i). Therefore, the CO directed the Employer to increase the wage offer to the prevailing rate of pay or submit evidence that the prevailing wage rate is in error. To prove the salary has been increased, the CO instructed the Employer to provide a written statement amending the alien employment certification application and amend item 12A of the ETA-750A form. (AF 86).

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

In rebuttal, the Employer submitted a letter dated March 18, 2004, advising the CO that the Auto Mechanic position was re-advertised reflecting the amended salary of $866.40 consistent with the prevailing wage rate required under the McNamara-O'Hara Service Contract Act. (AF 82). The Employer attached the Notice of Job Offer and explained that no applicants applied for the position. (AF 83).

On April 15, 2004, the CO then issued a subsequent NOF (hereinafter "NOF2") in which she determined that the rebuttal submitted by the Employer to the initial NOF was acceptable; however, the Employer's request for RIR was denied pursuant to 20 C.F.R. § 656.3, which defines "employment" as permanent, full-time work by an employee for an employer other than oneself, and 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity is clearly open to any qualified U.S. worker. (AF 74-75). The CO initially noted that the Employer's name according to the ETA 750-A form is "Monsey Trail-Tours, Inc." and that the nature of the business is vaguely described as "Charter." The letterhead on which the rebuttal was submitted indicates "Monsey Trails." Likewise, the telephone number indicated is listed for "Monsey Trails Corporation" and under the name of "Chaim Lunger," who signed the forms for this application. Notably, there are several applications pending at the New York State Department of Labor under the name of Monsey Trails and Monsey Trail-Tours to employ aliens as "Auto Mechanics, Automobile-body Repairers, Diesel, Mechanics and 'the like.'" Additionally, the CO noted that another company named "Monsey New Square Trails Corporation," which shares the same address and business activity as the other companies mentioned, has applications pending before the CO's office and the New York State Department of Labor. (AF 75).

As a result, the CO requested documentation that demonstrates that this application is in accordance with the regulations. Specifically, the CO sought clarification of the actual name of the sponsoring employer of this application, a more elaborate explanation of the nature of the company's business, and its relationship to the other mentioned similar businesses, as well as an explanation of why so many auto mechanic types are needed. Specific documentation, according to the CO, was to include

incorporation papers, business tax return documents for the last three years, the total number of individuals employed by the employer, and the job title and daily work schedule of each employee along with a copy of the W-2 forms for all employees working for the company during the last three years. Finally, the CO asked for an explanation of how the Employer can guarantee full-time work for another auto mechanic, especially in light of the multiple pending applications for similar positions. (AF 75).

In rebuttal, under cover letter of Monsey New Square Trails Corporation, President Chaim Lunger provided an explanation. First, he stated that the company has operated since 1956 and was incorporated in 1985 as "Monsey New Square Trails Corporation." The corporate filing papers were attached. According to Mr. Lunger, the company is also known as Monsey Tours and Monsey Trails. The Employer has 50 buses and employs 75 people, including 12 mechanics, 37 bus drivers, 3 telephone operators, 3 managers, 8 tour guides, 3 customer service agents, 3 sales people, 2 computer programmers, 1 web designer and 3 secretaries. The Employer stated that corporate tax returns for 2001 and 2002 were being included (however, they were not submitted). Lastly, the Employer explained that ridership is expected to increase due to rising gas prices, which necessitates the hiring of additional auto mechanics, auto-body repairers, and automotive electricians.

On August 10, 2004, the CO issued a Final Determination (hereinafter "FD") denying certification. (AF 44-45). Citing to 20 C.F.R. § 656.20(c)(8), the CO noted that the Employer failed to document that a *bona fide* permanent, full-time position exists, which is open to qualified U.S. workers. (AF 45). The CO reiterated that the various Monsey business entities had a number of job applications pending in her office and before the New York State Department of Labor for the same and "like" positions as requested here. Moreover, the NOF2 clearly stated what documentation was needed for the Employer to establish the existence of permanent, full-time work, and sufficient documentation was not provided in the rebuttal. According to the CO, although the Employer provided information about the nature of the company and its business

activities, the Employer did not furnish corporate tax returns as requested. The portion of the tax return that was submitted, "the federal statements," was insufficient. No W-2's were submitted as requested. Although the company established that it was a viable entity, the CO determined that its rebuttal failed to document that the auto mechanic position was permanent, full-time work. (AF 45).

By letter dated September 12, 2004, the Employer filed a request for review of the CO's Final Determination before the Board of Alien Labor Certification Appeals (hereinafter "the Board"). (AF 1). The Employer included in his request for review full copies of Employer's tax returns, "which clearly show[s] that [the Employer] ha[s] sufficient funds to pay the offered salaries." (AF 1). The case was docketed with the Board on November 9, 2004.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit documentation establishing that the position of Auto Mechanic in Spring Valley, New York is a *bona fide* job opportunity open to qualified U.S. workers, such as Federal tax returns and W-2's, which demonstrate how many employees worked for the Employer during the previous three years. Additionally, the CO sought explanation as to how the Employer could guarantee full-time work for a number of positions, for which alien labor certification is currently pending in her office and at the New York State Department of Labor.

In response, the Employer provided a listing of employees and incorporation papers, establishing that the company was at that time a viable entity. However, because the Employer did not submit corporate tax returns and W-2's as requested, the CO determined that the Employer had not provided documentation to establish a *bona fide* job opportunity for a permanent, full-time auto mechanic. Moreover, the Employer did

not provide documentation establishing that a need exists at the company for additional auto mechanics given that more than one application was pending.

Citing to Section 656.20(c)(8) in both the NOFs and FD, the CO fully and clearly explained that the Employer was required to submit documentation establishing that a *bona fide* opportunity exists. In other words, the Employer had to sufficiently prove that the position of Auto Mechanic is a true, permanent and full-time job at Monsey Trail-Tours, Inc. in the Spring Valley, New York area; not simply a position that exists on paper.[3] Thus, the CO carefully listed the specific type of documentation necessary to sufficiently rebut the findings.

If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Even though the Employer insists that present economic circumstances will increase its company's business, the Employer was required to produce sufficient documentation establishing that a permanent, full-time auto mechanic position exists. Thus, the Employer has not met its burden.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the

[3] *See Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

application is so fundamentally flawed that a remand would be pointless, such as here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.[4]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis

[4] With the Employer's request for review, the Employer attached its corporate tax return from 2001 and 2002 (AF 8-42); however, evidence submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 12, 1989) (*en banc*).

for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.